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No. 89-1040

In the Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT S. CHAPPELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the district court correctly denied petitioner's motion to vacate his sentence under 28 U.S.C. 2255 on the ground that petitioner failed to demonstrate cause for his failure to raise his claims on direct appeal of his conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16-18) and the order of the district court (Pet. App. 26-29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1989, and a petition for rehearing was denied on September 25, 1989. Pet. App. 18. The petition for a writ of certiorari was filed on December 26, 1989 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three years' imprisonment and four years' probation. His conviction was affirmed on direct appeal. *United States* v. *Chappell*, 698 F.2d 308 (7th Cir.), cert. denied, 461 U.S. 931 (1983). Thereafter, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. The district court denied relief, Pet. App. 26-29, and the court of appeals affirmed, Pet. App. 16-18.

1. The evidence at trial, which is summarized in the opinion of the court of appeals on direct appeal, 698 F.2d at 309-310, showed that in 1975 and 1976, petitioner operated a company that drilled oil wells in Pennsylvania. In his financing and operation of the business, petitioner misrepresented to the investors the number of oil wells in operation, the use of the invested funds, and the potential returns. Petitioner was represented at trial by attorneys James Bradford and Anthony Carissi, but he was represented on direct appeal of his conviction by attorneys Richard J. Darko, and Donald Tabbert. On that appeal, petitioner challenged only the sufficiency of the evidence and the admission of certain evidence. The court of appeals rejected both claims. 698 F.2d at 310-313.

2. a. In 1987, four years after his conviction was affirmed on direct appeal, petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his sentence. Pet. App. 30-37. In that motion, petitioner raised four new claims: (1) ineffective assistance of trial counsel, (2) prosecutorial misconduct, (3) judicial

misconduct, and (4) failure to present certain defense evidence to the jury. Petitioner's claim of ineffective assistance of counsel included allegations that attorney Bradford was not prepared for trial, failed to investigate the government's case, did not call witnesses to testify, and generally abandoned petitioner's interests. Pet. App. 30-32. In response, the government contended that relief under 28 U.S.C. 2255 was unwarranted because petitioner had not established cause for his failure to raise his claims on direct appeal or substantial prejudice as a result of the alleged errors.

The district court then afforded petitioner an opportunity to file an amended motion addressing the question whether there was cause for his failure to raise the issues on direct appeal of his conviction and substantial prejudice resulting from that failure. Petitioner's response, however, again alleged ineffective assistance only of trial counsel, and did not address the question whether the performance of appellate counsel established cause for his failure to raise the issues on direct appeal. Pet. App. 37-61. After considering petitioner's response, the district court denied relief. Pet. App. 28-29. The court recognized that when a defendant is represented by the same attorney at trial and on appeal, the attorney cannot be expected to argue that his own performance at trial was ineffective. But in this case, the court noted, petitioner had hired new counsel on appeal.[1] The

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[1] The court acknowledged petitioner's assertion that Bradford, petitioner's trial counsel, was at least partially involved in prosecuting the direct appeal, but it was unwilling to assume that the attorneys retained for the appeal abdicated their responsibilities by failing to raise a viable claim of ineffective assistance of trial counsel. Pet. App. 29.

court also pointed out that even if it were to assume that appellate counsel were reluctant to raise the claim of ineffective assistance of trial counsel, that would not provide a basis for failing to raise the other issues that petitioner raised in his Section 2255 motion. Pet. App. 29.[2]

b. The court of appeals affirmed in an unpublished order, holding that petitioner was barred from obtaining relief on any of his four claims under Section 2255 because he had not established cause for his failure to raise those claims on direct appeal. Pet. App. 16-18. The court explained (*id.* at 17):

> [Petitioner] argues that he established cause in the district court by alleging that his trial counsel was ineffective. But as the district court noted, this does not sufficiently explain why [petitioner], who was represented by different counsel on appeal, was precluded from raising these issues on appeal. Unless appellate counsel was similarly ineffective, and [petitioner] does not claim that counsel was, the alleged ineffectiveness of [petitioner's] trial counsel is insufficient to establish cause for [petitioner's] failure to raise these issues on appeal. Cf. United States ex rel. Barnard v. Lane, 819 F.2d 798, 802 (7th Cir. 1987).

3. After the court of appeals ruled, petitioner filed a second motion for relief under Section 2255, this time alleging that his counsel on direct appeal of his conviction were ineffective. On February 20, 1990, the district court denied petitioner's second motion. *United States* v. *Chappell*, No. IP 89-1251-C (S.D.

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[2] The court also observed that petitioner did not assert that the evidence that was not introduced at trial was newly discovered evidence. See Pet. App. 29 n.2.

Ind.). The court held that petitioner had not shown that he was entitled to relief under Section 2255. It explained (slip op. 6):

> This Court is familiar with the trial record in this case, even though Judge Steckler presided over the trial. The trial transcripts, pleadings and appellate opinion have again been examined. Based on that examination, the Court now finds that the failure of [petitioner's] appellate counsel to raise the issues identified in this action on direct appeal did not constitute the ineffectiveness of counsel. This finding is based on the meritlessness of the issues which are now asserted (and which were likewise asserted in the first Section 2255 proceeding), which would plainly not result in a reversal of his conviction.

In addition, the court concluded that petitioner was not entitled to relief on his second Section 2255 motion because he should have raised his claim of ineffective assistance of appellate counsel in his first motion under that Section. Slip op. 4-5; compare *Kuhlmann* v. *Wilson*, 477 U.S. 436, 452-455 (1986) (opinion of Powell, J.).

ARGUMENT

1. Section 2255 is limited to constitutional and jurisdictional claims and to those trial errors that result in a miscarriage of justice. See *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). Section 2255 is not a substitute for a direct appeal. *Id.* at 184; *United States* v. *Frady*, 456 U.S. 152, 165 (1982). Accordingly, if a defendant did not raise a claim at trial or on direct appeal, he cannot prevail on that claim on collateral attack under Section 2255 unless he shows "cause" for the procedural default at both the trial and appellate levels and substantial prejudice

resulting from the error. See *Smith* v. *Murray*, 477 U.S. 527, 533 (1986); *Murray* v. *Carrier*, 477 U.S. 478, 485-486 (1986); *United States* v. *Frady*, 456 U.S. at 167-169. To demonstrate cause, the defendant ordinarily must show that his default was due to a factor external to the defense, such as the novelty of the claim or interference by authorities. But if counsel's failure to raise an objection at trial or to raise an argument on appeal amounted to ineffective assistance of counsel under Sixth Amendment standards, that ineffectiveness itself constitutes cause for a procedural default. *Murray* v. *Carrier*, 477 U.S. at 488. Accordingly, the Court held in *Murray* v. *Carrier* that the defendant had not demonstrated cause for his failure to raise his claim on direct appeal of his conviction because he did not establish an external factor that prevented the claim from being raised and did not show that his attorney's omission on appeal amounted to ineffective assistance of counsel under the standards of *Strickland* v. *Washington*, 466 U.S. 668 (1984). 477 U.S. at 485-492. Accord *Smith* v. *Murray*, 477 U.S. at 533.

Against this background, the courts below correctly concluded that petitioner could not obtain relief under Section 2255 on his claims of prosecutorial misconduct, judicial misconduct, and the omission of certain evidence at trial, because he had not established cause for his failure to raise those claims on direct appeal of his conviction—*e.g.*, by showing that his appellate counsel's failure to raise those issues amounted to constitutionally ineffective assistance under the standards of *Strickland* v. *Washington* and *Evitts* v. *Lucey*, 469 U.S. 387 (1985). In fact, although the district court afforded petitioner an opportunity to supplement his pleadings to show cause

for his failure to raise the issues on direct appeal, petitioner's response to that invitation discussed only the alleged ineffectiveness of his *trial* counsel. See Pet. App. 28-29. Moreover, the district court, in denying petitioner's second Section 2255 motion, has since rejected his contention that appellate counsel rendered ineffective assistance. See page 5, *supra*.

2. a. The fourth claim raised in petitioner's first Section 2255 motion was that petitioner's trial counsel rendered constitutionally ineffective assistance. It has been the position of the United States for some time that claims of ineffective assistance of trial counsel ordinarily should be raised in the first instance in a motion under Section 2255, rather than on direct appeal. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984).[3] This is so for two reasons. First, if the same attorney represents the defendant both at trial and on appeal, it is unrealistic to expect the attorney to argue on appeal that his performance at trial was constitutionally defective. Second, the resolution of claims of ineffective assistance of trial counsel often requires consideration of matters that are outside the record on direct appeal and that should be considered by the district court in the first instance. Where claims of ineffective assistance of trial counsel are ordinarily to be raised on collateral attack under Section 2255, a failure to

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[3] In *Cronic*, the United States argued (U.S. Br. at 40-41 n.30; U.S. Reply Br. at 20 n.17) that claims of ineffective assistance of trial counsel should be raised on collateral attack under 28 U.S.C. 2255. The Court did not pass on the merits of that contention as a general matter. It instead concluded that the claim of ineffective assistance of trial counsel was properly presented on appeal in that case because the claim had been raised in a timely motion for a new trial under Fed. R. Crim. P. 33. 466 U.S. at 667 n.42.

raise such a claim on direct appeal would not constitute a procedural default, and the defendant therefore would not have to establish "cause" for that failure in order to present a claim of ineffective assistance of trial counsel in a motion under Section 2255.[4]

A number of courts of appeals, in agreement with our general view and our submission in *Cronic*, have held or expressed a strong preference that a claim of ineffective assistance of trial counsel should ordinarily be raised in a motion under Section 2255, at least where it has not already been addressed by the district court in a motion for a new trial or otherwise. See, *e.g.*, *United States* v. *Costa*, 890 F.2d 480, 482-483 (1st Cir. 1989); *United States* v. *Cruz*, 785 F.2d 399, 404 (2d Cir. 1986); *United States* v. *Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States* v. *Sandini*, 888 F.2d 300, 311-312 (3d Cir. 1989); *United States* v. *Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 459 U.S. 843 (1982); *United States* v. *Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), cert. denied, 109 S. Ct. 2447 (1989); *United States* v. *Myers*, 892 F.2d 642, 648-649 (7th Cir. 1990);

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[4] In its brief as appellee in the court of appeals in this case, the government argued that petitioner must show cause for his failure to raise any of his claims on direct appeal. That submission was not consistent with the position of the United States insofar as petitioner's claim of ineffective assistance of trial counsel is concerned. As stated in the text and in our brief in *Cronic*, we believe such claims ordinarily should be raised in a motion under Section 2255. It follows from that position that a defendant should not have to establish cause for his failure to raise the issue on direct appeal.

United States v. *Rewald*, 889 F.2d 836, 859 (9th Cir. 1989); *United States* v. *Casamayor*, 837 F.2d 1509, 1516 (11th Cir. 1988), cert. denied, 109 S. Ct. 813 (1989). In the District of Columbia Circuit, if a claim of ineffective assistance of trial counsel is raised on direct appeal, that court ordinarily will remand the case to the district court for resolution of the claim before disposing of the direct appeal—or, if the defendant has also filed a Section 2255 motion raising an ineffectiveness claim, the court will stay proceedings on the direct appeal pending resolution of the Section 2255 motion. *United States* v. *Cyrus*, 890 F.2d 1245, 1247 (1989).

The approach of the Seventh Circuit, whose decision is at issue here, does not appear to be firmly established. In its unpublished order in this case, the panel concluded that because petitioner was represented by new counsel on direct appeal, he should have raised his claim of ineffective assistance of trial counsel on direct appeal and therefore must now establish cause for failing to do so in order to present that claim in a motion under Section 2255. Pet. App. 17.[5] Another panel of the Seventh Circuit reached a similar conclusion where the defendant likewise had new counsel on appeal. See *Page* v. *United States*, 884 F.2d 300, 301-302 (1989).

It is not clear, however, that the Seventh Circuit is firmly committed to that approach. Subsequent to

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[5] Although petitioner appears to suggest (Pet. 4) that he was represented on appeal by his trial counsel, both courts below concluded that petitioner was, for these purposes, represented by new counsel on appeal. The concurrent determination of that factual issue by both courts below does not warrant further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

the decisions in the instant case and in *Page*, another panel of the Seventh Circuit stated that claims of ineffective assistance of trial counsel must ordinarily be raised under 28 U.S.C. 2255. *United States* v. *Myers*, 892 F.2d 642, 648-649 (1990). Because the defendant in *Myers* itself was represented by new counsel on appeal, the panel's statement regarding the preferred means for resolving ineffectiveness claims presumably included such cases. The court in *Myers* nevertheless chose to allow the claim to be considered in the proceedings on direct appeal in that particular case—and to remand for the district court to make factual findings on the claim—because the record on appeal strongly suggested that trial counsel had been ineffective and the panel was reluctant to allow the judgment of conviction to become final until that issue was resolved. See 892 F.2d at 648-649.[6] Thus, in light of the intervening decision in *Myers*, it does not appear that the Seventh Circuit actually adheres to a rule that a claim of ineffective assistance of trial counsel must be raised on direct appeal where the defendant has new counsel, and it therefore is not clear that the Seventh Circuit would (as a corollary to such a rule) continue to apply the cause-and-prejudice standard where new counsel on appeal did not raise a claim of ineffective assistance of trial counsel.

Although we believe that the interests of the criminal justice system support the approach employed by the majority of circuits—to channel claims of

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[6] Compare *United States* v. *Theodoropoulos*, 886 F.2d 587, 598 (3d Cir.), mandamus denied, 109 S. Ct. 1179 (1989) (holding that a claim of ineffective assistance of trial counsel should first be presented in a motion under Section 2255, even where the defendant had new counsel on appeal).

ineffective assistance of trial counsel to proceedings under Section 2255—it would not be unfair for the courts to follow the approach of the Seventh Circuit in this case—namely, to require a defendant who is represented by new counsel on appeal to raise any claim of ineffective assistance of trial counsel on direct appeal, and to apply the cause-and-prejudice standard for excusing a procedural default if the defendant does not do so. Under that approach, the court of appeals would have the option of either addressing the ineffectiveness issue in the proceedings on direct appeal (with a remand to the district court if necessary for further proceedings on the issue) or declining to resolve the issue on direct appeal and remitting the defendant to a motion under Section 2255.

b. The manner in which claims of ineffective assistance of trial counsel should generally be presented does not warrant this Court's review. Although the courts of appeals take somewhat different approaches to this question, they of course agree that such claims can be raised, either on direct appeal or on collateral attack. The courts of appeals also uniformly provide a mechanism whereby claims of ineffective assistance of trial counsel can be heard in a manner that will assure consideration by the district court in the first instance where necessary to allow development of a factual record, either by remanding the claim for consideration by the district court where it is raised for the first time on direct appeal or by declining to entertain the claim without prejudice to raising it in a motion under 28 U.S.C. 2255. And no court of appeals holds that the defendant is barred from raising the claim on collateral attack under 28 U.S.C. 2255 if he was represented by trial counsel on ap-

peal, where it would be unrealistic to expect the claim to be raised on direct review.

Thus, the precise manner in which claims of ineffective assistance of trial counsel are heard is essentially a matter of sound judicial administration within each circuit that may appropriately be left to the respective courts of appeals to refine. Whatever variation there may be among the courts of appeals on subsidiary matters concerning the presentation of such claims does not affect the substantive rights of the defendant or present questions of broad practical significance warranting this Court's attention. In particular, review by this Court of the Seventh Circuit's disposition of petitioner's claim is not warranted, because that court's intervening decision in *Myers* indicates that it has not reached a concluded view on whether a claim of ineffective assistance of trial counsel should ordinarily be raised on direct appeal, even where the defendant is represented by new counsel on appeal. Moreover, a denial of certiorari will not be unfair to petitioner, because the district court has recently passed on petitioner's claims, including his claim of ineffective assistance of trial counsel, and found them to be without merit.[7]

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[7] Petitioner waited five years—from 1982 until 1987—to raise his claim of ineffective assistance of trial counsel in his Section 2255 motion. At this late date, it might prove difficult for petitioner's trial counsel to recall all the circumstances concerning his representation of petitioner. For that reason, petitioner's lengthy delay in bringing his claim furnishes an independent ground for denying petitioner's motion. See *Gunn* v. *Newsome*, 881 F.2d 949, 955 n.4 (11th Cir.), cert. denied, 110 S. Ct. 542 (1989); *United States* v. *Gutierrez*, 839 F.2d 648, 650-652 (10th Cir. 1988). This delay takes on added significance in view of the fact that petitioner retained new counsel to prosecute his direct appeal. If those attorneys be-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS E. BOOTH
Attorney

FEBRUARY 1990

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lieved that trial counsel had rendered ineffective assistance but also believed that such a claim should not be presented on direct appeal, they could have promptly presented that claim by filing a motion on petitioner's behalf under Section 2255.

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